No. ~~1010~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

COLGATE-PALMOLIVE COMPANY AND TED BATES & COMPANY, INC., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TED BATES & COMPANY, INC.

H. THOMAS AUSTERN
701 Union Trust Bldg.
Washington 5, D.C.

RICHARD S. ARNOLD
DAVID FALK
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.

May, 1964

INDEX

CITATIONS

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1010

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

COLGATE-PALMOLIVE COMPANY AND TED BATES & COMPANY, INC., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TED BATES & COMPANY, INC.

OPINIONS BELOW

The first opinion of the Court of Appeals, reported at 310 F.2d 89, is found in Appendix A to this Brief (hereafter referred to as "Bates App."). The second opinion of the Court of Appeals, reported at 326 F.2d 517, is found in Appendix A to the Petition. The three opinions of the Federal Trade Commission are reproduced in the certified record of the proceedings below filed in this Court (R. 9, 50, 106).*

---

* "R." refers to the certified record of the proceedings below filed in this Court.

QUESTION PRESENTED

Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

STATUTE INVOLVED

Section 5(i) of the Federal Trade Commission Act, added by the Act of March 21, 1938, 52 Stat. 114, 15 U.S.C. § 45(i), provides as follows:

> "If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."

STATEMENT OF THE CASE

The Petition fails to state the facts completely. Respondent Ted Bates & Co. is therefore constrained to present a more accurate summary of the two orders and three opinions of the Federal Trade Commission and the two opinions and mandates of the Court of Appeals for the First Circuit.

In its first opinion, the Commission found two violations of law in the television advertisements for Rapid

Shave Shaving Cream (R. 9). The first, denominated by the Court below as the "single misrepresentation" (310 F.2d at 94, Bates App. 9a), indeed "trivial" (310 F.2d at 92, Bates App. 5a), was that respondents had misrepresented the moisturizing properties of Rapid Shave because the product could not perform as claimed in the advertisement. The claim that a piece of heavy, coarse sandpaper could be coated with Rapid Shave and then be promptly shaved clean with a safety razor was held to be false (R. 15-19).

The Commission went further. It concluded that even if that single claim for the product *were true,* the undisclosed use of a plastic mock-up, to simulate the sandpaper, would in and of itself be illegal (R. 19-26).* As the Commission summarized its additional view, even if the claim of "effectiveness in shaving sandpaper" were true,

> ". . . the commercials would be deceptive, within the meaning of the statute, in the manner in which they deliberately misinform the viewer that what he sees being shaved is genuine 'tough, dry sandpaper,' rather than a plexiglass mock-up" (R. 19).

The cease and desist order entered against the respondents by the Commission was in two parts, paral-

---

* A mock-up or prop is an object used in television commercials to simulate the appearance of another object and is frequently used because the simulated object cannot be telecast without substantial distortion. For example, what appears to the television viewer to be a white shirt is in fact a blue shirt. In this case, the Hearing Examiner stated in a finding quoted by the Commission, and not overruled by it, that "[w]hen placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper" (R. 12).

leling the two findings of misrepresentation (R. 7-8). One part prohibited the respondents from misrepresenting the "quality or merits" of Rapid Shave or of any other shaving cream. On appeal, the Court of Appeals held that the Commission had adequately found the facts justifying this part of the order—that Rapid Shave could not perform in shaving sandpaper as depicted in the advertisements—but suggested that, since "[r]espondents' only offense was the making of a single misrepresentation about a single product" (310 F.2d at 94, Bates App. 9a), the scope of the order was too broad.

On remand, the Commission revised this part of the order (R. 102-105). The respondents, on their second appeal, contended that these changes were insubstantial and consequently that the revised order was not in accordance with the direction of the Court. Accordingly, the Court of Appeals again returned this part of the order to the Commission for revision, for the reason that "the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct" (326 F.2d at 523, Pet. App. 30).

This first part of the case is not now in issue. Under the Commission's Petition for Certiorari, the fact that Rapid Shave cannot shave sandpaper as represented in the advertisement is not in dispute, nor is any question raised as to what constitutes an appropriate order for the single instance of misrepresentation found. That issue, not here raised, remains for further consideration by the Commission, on remand, in accordance with the lower Court's direction.

The second part of the Commission's original cease and desist order was aimed at prohibiting what the Commission deemed to be "an unfair advertising practice" (R. 14, 30-34), namely, the undisclosed use of mock-ups even where the visual appearance of the qualities or merits of the product was itself accurate—where the claim made for the product was true. As written, this part of the original order prohibited the respondents from:

> "Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product" (R. 8).

Initially, the Court of Appeals, in an opinion written by Judge Bailey Aldrich, considered whether the meaning of this part of the order, relating to the use of props in making a truthful product claim, was uncertain. The Court, however, resolved the meaning of the order with the aid of statements from the Commission's first opinion and from Commission counsel's oral argument. The Court concluded that the order was intended to prohibit "any demonstration . . . if it was not 'genuine' in that the actual substance used in the studio . . . was not the product itself" (310 F.2d at 93, Bates App. 6a). The Court then held not, as stated in the Petition for Certiorari, that the order "was too broad" (Pet. 4), but that the order was

grounded upon a "fundamental error" of substance—the view that it is a misrepresentation and a violation of the Act to use a mock-up even where the claim being made for the advertised product is true (310 F.2d at 94, Bates App. 9a). Judge Aldrich stated the principle governing the case:

> "But where the only untruth is that the substance [the viewer] sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (310 F.2d at 94, Bates App. 8a-9a).

The case was remanded for "[f]urther proceedings to be in accordance with this opinion" (310 F.2d at 95, Bates App. 10a).

The Commission did not petition this Court for a writ of certiorari to review that holding. Although the substantive issue of the legality of mock-ups used in making a truthful product claim—the issue now sought to be presented by the instant Petition—was then fully ripe for decision by this Court, the Commission on remand undertook instead to redraft its original order, to restate its meaning and scope, and to repeat its underlying legal basis.

The order as thus reformulated forbade:

> "Unfairly or deceptively advertising any [product sold in commerce] by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale,

> and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein" (R. 102-104).

This order, as conceded by the Commission in its Petition (Pet. 2), applies even though the product claim is completely truthful.

In its second opinion, on remand, the Commission denied that its initial order, and its second order, as redrafted, made every use of mock-ups in television advertising *per se* illegal (R. 55).

> "Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying 'I love Lipsom's tea', assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product" (R. 55).*

Thus, the Commission bluntly refused to accept the Court of Appeals' holding that mock-ups may be used

---

* The third opinion by the Commission was rendered to accompany the Commission's rejection of the respondents' objections to the Commission's second order (R. 106).

if they truthfully communicate a product's qualities and merits.

The respondents again sought review in the Court of Appeals for the First Circuit, arguing that the new order of the Commission once again, albeit in slightly different language, prohibited the undisclosed use of mock-ups to make truthful product claims, and therefore plainly flouted the decision and mandate of the Court. Judge Aldrich, writing once more for the Court, agreed that the issue on the appeal was whether the new order of the Commission was in accord with the mandate of the Court. In again upsetting the Commission's order, he wrote that in the first decision the Court of Appeals had "reached a number of conclusions not labelled suggestions which the Commission was not free to disregard under the mandate" (326 F.2d at 519, Pet. App. 21). Nevertheless, the Court decided to "make an exception and re-examine [the Commission's] present position on the merits rather than from the limited standpoint of whether [the order] comports with our previous opinion" (326 F.2d at 519, Pet. App. 22).

Judge Aldrich then wrestled with the meaning of the Commission's reformulated order. On the basis of what the Commission wrote in its second and third opinions (R. 50, 106), Judge Aldrich confessed that "we are not sure whether we now have before us a new position, or merely its old one 'restated'" (326 F.2d at 519 n.5, Pet. App. 22 n.5). He noted that at the oral argument Commission counsel, with prior approval from the Commission (326 F.2d at 519 n.4, Pet. App. 21 n.4), had informed the Court that the word "demonstration" in the phrase "test, experiment or demonstration" in the order "was to be read by the

rule of *ejusdem generis*, and meant demonstration 'in the nature of a test or experiment' " (326 F.2d at 520, Pet. App. 23).

Even with Commission counsel's gloss on the order, Judge Aldrich did not know how the order could be given any practicable application. The first difficulty was in differentiating a test, experiment or demonstration in the nature of a test or experiment, where under the Commission's order mock-ups could not be used, from other situations in which mock-ups were not to be prohibited (326 F.2d at 521, Pet. App. 24). In addition, Judge Aldrich could discern no logical reason why mock-ups should be permitted in the one class of cases and prohibited in the other; that is, why seeing a mock-up of ice cream (really emulsified cold cream) which gives an accurate visual image demonstrating the rich and savory qualities that the ice cream actually possesses, is any different from seeing a mock-up of sandpaper being shaved when the shaving cream can in fact aid in shaving sandpaper as depicted (326 F.2d at 520, 522, Pet. App. 24, 28). These difficulties with the Commission's order impelled Judge Aldrich to reaffirm the basic principle already set forth in the first opinion: "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (326 F.2d at 523, Pet. App. 29). And he concluded with the following instruction:

> "Accordingly, we instruct the Commission, *as we thought we had directed it before*, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished" (326 F.2d at 523, Pet. App. 29-30) (emphasis supplied).

The Court of Appeals has thus twice rejected the Commission's claim that mock-ups may not be used in demonstrations even if the qualities and merits of the product being demonstrated are accurately communicated.

REASONS FOR DENYING THE WRIT

The Federal Trade Commission has petitioned for a writ of certiorari to review a question raised by one part of a cease and desist order that has taken the Commission two orders and three opinions to articulate and yet has twice been reversed by the Court of Appeals for the First Circuit. The respondent respectfully submits that there are substantial reasons why this is not an appropriate case for review by the Supreme Court.

I.

THERE IS NO CONFLICT IN CIRCUITS

The Petition proceeds upon the premise that, even where the product claims made in advertisements using mock-ups are fully accurate and true, they may be proscribed under the Act. As tendered to this Court, the legal issue concerns the power of the Commission to prohibit the use of mock-ups in making true claims. This attack by the Commission upon the use of mock-ups and props in television advertising to make truthful claims about products is a novel theory of law without support from any prior decision of the Commision or of any court.

The cases cited by the Commission in its petition (Pet. 8 n.3) all involved television tests, experiments,

and demonstrations that the Commission claimed *misrepresented* the qualities or merits of the advertised product, either because the product would not in fact perform as represented,* because the test or experiment could not in fact be performed as represented,** or because the test or experiment bore no reasonable relationship to the quality or merit claimed for the product.***

In only two of these cases were the orders of the Commission designed to prohibit the undisclosed use of mock-ups even where the claim made for the product is truthful. The order in one of these cases, *Libby-Owens-Ford Glass Co.*, F.T.C. Docket 7643 (July 16, 1963), is presently on appeal to the Court of Appeals for the Sixth Circuit. The order in the other, *Carter Products, Inc.*, F.T.C. Docket 7943 (April 25, 1962), a case involving a shaving cream competitive with Rapid Shave, was set aside by the Court of Appeals for the Fifth Circuit. 323 F.2d 523 (5th Cir. 1963). In the *Carter* case, in an opinion written by Judge Wisdom, the first opinion of the Court of Appeals in the present case was specifically followed. Judge Wisdom characterized that opinion as "well-reasoned, in keeping with principles established in non-television

---

* Brown & Williamson Tobacco Corp., 56 F.T.C. 936 (1960); Standard Brands, Inc., 56 F.T.C. 1491 (1960).

** Aluminum Co. of America, 58 F.T.C. 265 (1961); Carter Products, Inc., F.T.C. Docket 7943 (April 25, 1962), *order set aside*, 323 F.2d 523 (5th Cir. 1963); Libby-Owens-Ford Glass Co., F.T.C. Docket 7643 (July 16, 1963).

*** Hutchinson Chemical Corp., 55 F.T.C. 1942 (1959); Eversharp, Inc., 57 F.T.C. 841 (1960); The Mennen Co., 58 F.T.C. 676 (1961); Lever Bros. Co., F.T.C. Docket 7747 (October 15, 1962).

cases, and applicable to the case now before us." 323 F.2d at 528.

Even more striking, on remand, the Commission in *Carter* acceded to the decision and mandate of the Fifth Circuit (unlike its action on remand in the present case), and entered an order that does not prohibit the use of mock-ups to make truthful claims for the products being advertised. *Carter Products, Inc.*, F.T.C. Docket 7943 (order entered December 6, 1963).

Thus, the Commission is seeking to raise in this Court a newly devised theory of violation of the Federal Trade Commission Act that not only has been rejected by two courts of appeals and approved by none, but also was thereafter abandoned by the Commission with respect to advertisements for a shaving cream that is in active competition with Rapid Shave.

II.

THE COMMISSION FLOUTED THE DECISION AND MANDATE OF THE COURT OF APPEALS

A preliminary issue on this Petition is whether the patent refusal of the Commission to follow the decision and mandate of the Court of Appeals ought to be countenanced. The Commission did not petition for a writ of certiorari to review the first decision of the Court of Appeals, in which, as has been seen, that Court announced its disagreement with the Commission on the substantive issue of the lawfulness of using mock-ups in television advertisements to make truthful claims for the advertised product. Instead, the Commission undertook to enter a new, reformulated order and to

restate its legal position in two more opinions to accomplish essentially the same objective—a prohibition against the use of mock-ups to make truthful claims for the advertised product. The basic substantive legal premise of the second order, as of the first, was that the use of a mock-up is illegal even when all claims made for the advertised product are absolutely true.

On the appeal from this second order, the question necessarily arose whether the Commission had obeyed the earlier decision and mandate of the Court of Appeals. It is basic to the effective administration of justice that inferior tribunals in the federal judicial hierarchy obey the decisions of the courts empowered to review their judgments. This fundamental principle is true for state courts whose decisions on certain issues are subject to review by the Supreme Court. *E.g., Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816). It is true for lower federal courts. *E.g., United States* v. *Haley,* 371 U.S. 18 (1962). It is also true for administrative agencies, whether the controlling rule of law was announced by the appellate court in a different case, *e.g., The Stacey Mfg. Co.* v. *Commissioner,* 237 F.2d 605 (6th Cir. 1956), or, as here, in the very same case. *E.g., Morand Bros. Bev. Co.* v. *N.L.R.B.,* 204 F.2d 529 (7th Cir.), *cert. denied,* 346 U.S. 909 (1953).

This basic principle has been given specific statutory statement in the Federal Trade Commission Act. Section 5(i) of that statute provides in pertinent part that, after a court of appeals has set aside a Commission order, and following the expiration of the period for filing a petition for a writ of certiorari,

> "then the order of the Commission *rendered in accordance with the mandate* of the court of appeals

> shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that *it will accord with the mandate*, in which event the order of the Commission shall become final when so corrected." 15 U.S.C. § 45(i) (emphasis added).*

The weakness of the Commission position—that the Act prohibits the use of mock-ups in making completely truthful claims—is undoubtedly reflected in the procedural morass it has thus created. The Commission's failure to petition for certiorari from the first explicit Court of Appeals decision on that issue and its presentation of the same issue in the present Petition confuses what will be in issue before this Court.

A grant of certiorari in this case would bring before this Court for review not only the question of substantive law belatedly asserted in the Petition, but also initially the question whether the Commission's second order was in accordance with the Court of Appeals' first opinion. Respondent would assert as an independent ground for sustaining the First Circuit's judgment that the Commission had plainly disobeyed that Court's prior mandate. Thus, the substantive issue asserted in the Petition could then be considered only if this Court were first to resolve the mandate point in the Commission's favor. Such a holding, it is submitted, would be unwarranted.

---

* Section 5(h), governing the case where this Court modifies or sets aside an order of the Commission, similarly specifically provides that the new order of the Commission shall be rendered in accordance with the mandate of this Court.

III.

THE CEASE AND DESIST ORDER OF THE COMMISSION IS AMBIGUOUS AND CANNOT BE GIVEN PRACTICABLE APPLICATION

It is not the task of this Court to parse, clarify, and elucidate the meaning of an administrative order which the reviewing Court of Appeals has held ambiguous and impracticable of enforcement. Although the Commission seeks review of the question of the lawfulness under the Federal Trade Commission Act of using mock-ups in television advertisements that make truthful product claims, that issue can arise only in the context of a particular cease and desist order. But, as the order involved in this case is impossibly vague, this is not an appropriate case in which to resolve the substantive issue.

The ambiguity in this second order, centering around the phrase "test, experiment, or demonstration," is of two types. First, there is the question of how to parse the words in the order. The Court of Appeals, finding no clear answers either in the language of the order or in the two accompanying Commission opinions, at the oral argument found it necessary to ask Commission counsel for clarification and was told that the word "demonstration" had to be read according to the rule of *ejusdem generis* and really meant a demonstration "in the nature of a test or experiment" (326 F.2d at 520, Pet. App. 23). The fact that Commission counsel had been specifically authorized by the Commission to make this abstruse construction of the order (326 F.2d at 519 n.4, Pet. App. 21 n.4) plainly indicates that even after two tries at framing a precise order, the Commission knew that it had been unsuc-

cessful. Moreover, the Court of Appeals was never sure whether this was the same order it had reviewed earlier, but differently worded, or a different order altogether (326 F.2d at 519 n.5, Pet. App. 22 n.5).

Secondly, even after the grammar of the order is possibly fixed by the Commission's *ex post facto* rule of construction, there remains the more basic question of what the order means, and this question leads into the further question of whether the order can be practicably applied and administered. In other words, does the order, when applied to the many fact situations that will arise, clearly and unambiguously distinguish what it prohibits from what it does not? The Court of Appeals thought that this order did not and said so:

> "In spite of the Commission's belief that it has resolved all ambiguities, we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts" (326 F.2d at 521, Pet. App. 24).

An attempt to distinguish the prohibited uses of mock-ups from the permitted uses receives no help from the Commission's explanatory opinions. For example, in its second opinion, the Commission asserted that colored water could be used in the place of Lipsom's iced tea so long as "the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product" (R.

55). On the basis of this exegesis of the order, one would expect it to prohibit showing a glass of Lipsom's iced tea which is really colored water in the hand of actor who says, "That dark color means a more tea-like taste." But the Commission's brief in the Court of Appeals on the second appeal asserted that the order drew a distinction "between a mock-up which 'displays or illustrates a claim' [which is not prohibited by the order], and one that purportedly 'objectively' 'proves its truthfulness'" (326 F.2d at 520 n.6, Pet. App. 22 n.6). Under this distinction, the hypothetical advertisement may not violate the order, because the visual presentation of a quality in the Lipsom's iced tea advertisement is not of the same order of "objectivity" as is associated with a more scientific test or experiment.

The Court of Appeals aptly illustrated the ambiguity in applying the order in its example of the bed sheets (326 F.2d at 521, Pet. App. 24-25). The Court asked whether it would violate the order in advertising the cleaning power of a laundry soap to show a bed sheet which appears to the viewer to be white but in fact is blue. If such a demonstration is within the second order, it is difficult to see how the reformulated order is any different from the first order. If this demonstration is not within the prohibition of the second order, the question would then arise—and the Court pertinaciously asked it—whether the order would apply if the commercial showed the sheet being removed from a washing machine. Is this a test or experiment? Or to carry the illustration one step further, would the order apply if the viewer saw the sheet, in a soiled condition, placed in the machine and later removed sparkling clean and white?

The ambiguities in the Commission's order are multifarious. They remain despite extensive labors—in the form of two orders, three opinions, and two oral arguments—to eliminate them. The persistence of these ambiguities abundantly confirms that the underlying substantive principle on which the Commission order is sought to be based is without merit.

In addition, these ambiguities furnish an additional ground for upholding the Court below. In deprecating the need for clarity in its Petition for Certiorari (Pet. 15), the Commission not only ignores its own prior emphasis on "the imperative need for explicitness in administrative adjudication" (R. 51), but more importantly forgets this Court's warning in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962):

> "The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Id.* at 367-68.

The instant order falls conspicuously short of this standard. Not only was the Court below correct in its interpretation of the Act, but it was also correct under *Broch* in remanding the order.

IV.

THE COURT OF APPEALS CORRECTLY INTERPRETED THE ACT

The basic reason offered by the Commission in support of its Petition is that the lower Court incorrectly interpreted the statute, both in its original holding and in its reaffirmation of that holding on the second

appeal, in deciding that where an advertisement makes a wholly true claim for a product, the fact that a mock-up is used in communicating that true claim to the television audience does not render the advertisement illegal. To buttress its position on this legal question, the Commission suggests that this determination is confided by the statute to its "discretion," and then offers a series of conjectures, having no factual basis of record, as justifications for its position.

The crucial difficulty with this position (which the Court below and the Fifth Circuit have rejected, and which no court has accepted) is that it completely overlooks the legal requirement that an actionable misrepresentation must be material. The basic theory of law presented by the Petition does not involve the appropriateness of a particular remedy, but whether under the Act an advertisement that makes no false claim is illegal. As the Court below held in its first opinion:

> ". . .we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means" (310 F.2d at 93, Bates App. 7a).

In holding that the use of mock-ups to communicate a truthful product claim is deceptive, the Commission is confusing *how* a message is communicated to a television viewer with *what* it says to that viewer. The principle stated by the Court of Appeals on the first appeal—that where the claim for a product is *true,* the Commission cannot under the Act prohibit the use

of a mock-up or prop in a video portrayal, or in a test, experiment, or demonstration, making that true claim —is plainly a correct principle of law.

As collateral support for its position, the Commission insists, as it did in its several opinions, that the undisclosed use of mock-ups in television advertising is a "deceptive trade practice under established standards" (Pet. 9). But no Commission decision prior to this one (see page 11, *supra*) nor any decision of any court supports the Commission's prohibition against a means of communicating an entirely truthful claim. The Commission is, of course, correct when it states that under prior decisions an advertiser may not misrepresent either "the objective characteristics of the advertised product" or "some extrinsic factor" relating to the product (Pet. 10). But an advertisement that employs a mock-up to make a truthful product claim does not make any such misrepresentation.*

---

* The Commission's example (Pet. 10), suggested by Niresk Industries, Inc. *v.* FTC, 278 F.2d 337, 341-42 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960), where the advertiser represented that its product had been awarded the Good Housekeeping Seal, when in fact the product had not, and with the additional assumption (not in the decision) that the product in fact met the Good Housekeeping Seal standards, is simply a case of a statement of a fact about the product that is not true. There the advertisement represented that the product had been awarded the Good Housekeeping Seal when it had not. Similarly, in FTC v. Royal Milling Co., 288 U.S. 212 (1933), also cited by the Commission as a case in point (Pet. 10), the use of the name "Royal Milling Company" implied a fact about the flour being sold that was not true, namely, that the flour had been milled from wheat by the selling company whereas in fact that company merely mixed and blended previously manufactured flour. The same distinction holds for cases such as FTC v. Standard Education Soc., 86 F.2d 692, 697

As the Commission has framed the issue on which it now seeks Supreme Court review (Pet. 2), there is no untrue statement of a fact about a product when a mock-up is used in portraying *a quality the product in fact possesses*. By hypothesis, what the television viewer sees on the television screen is precisely accurate. If, for example, the viewer sees a mock-up of a testing machine measuring the tensile strength of a piece of rope, he is seeing a test that has been already performed and can be performed again. The only role played by the mock-up of the testing equipment is in communicating that accurate claim of performance to the viewer. There is therefore no support in the earlier cases, which turned upon the presence of factually false claims about the advertised product, for the Commission's position here.

Whatever discretion the Act may confer upon the Commission, the statute does not accord it the power to determine that an advertisement that makes no false

---

(2d Cir. 1936), *modified*, 302 U.S. 112 (1937), where it was charged that the advertisements represented that certain persons had given testimonials about the product when in fact they had not.

Judge Aldrich, in his first opinion, accurately disposed of this latter type of case as follows:

> "We would agree that it is an unfair advertising practice to publish a purported testimonial when none had been received, even if, from the fact that the advertiser's sales were high and constant, it must be obvious that he has many satisfied customers. A more accurate analogy would be if the advertiser did in fact receive a testimonial, but written in ink that would not photograph. Would the advertiser be guilty of deceit if he copied it over and photographed the copy?" (310 F.2d at 94 n.9, Bates App. 8a n.9).

All the other cases cited by the Commission in its Petition are also cases in which the advertisement made a claim for the product that was not true (Pet. 9 n.4).

claim for a product is somehow false advertising. Even were its suppositions logical and consistent (and in two carefully reasoned opinions the lower Court demonstrated that they were not), or its order not ambiguous and impracticable of compliance, administrative "discretion" does not permit interpreting a prohibition against false advertising to proscribe advertisements that make only true claims.*

In short, all that the Act requires is that the viewer see and hear an advertising message that is true as to the qualities or merits claimed for the product. The way in which that truthful claim is communicated—be it by a test, experiment, diagram, or animated cartoon—is wholly immaterial. The attempt by the Commission to deal with the *means* of communicating truthful product claims by prohibiting the use of mock-ups or props is beyond the Act. The decision of the Court below was plainly right.

---

* One result of the position that the Commission espouses (Pet. 12-17) is that it may be impossible in some instances to advertise effectively a product intrinsically superior to competing products if it is not possible to devise tests of that product's superior qualities that do not require the use of mock-ups for accurate reproduction over television. At the same time, the inferior competing products, whose major advantage is that their qualities (although objectively inferior) can be demonstrated without the use of mock-ups or props, will receive a far broader advertising coverage and make a far greater dramatic impact upon the viewer. Under a rule of illegality that looks only to the *truth* of the claims being made, and not to the *means* of making them, all competing products remain on a par except to the extent that their actual qualities or merits may differ. Compare the lower Court's discussion, 310 F.2d at 93-94, Bates App. 7a-8a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

H. THOMAS AUSTERN
701 Union Trust Bldg.
Washington 5, D.C.
Attorney for Respondent
Ted Bates & Company, Inc.

RICHARD S. ARNOLD
DAVID FALK
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.
Of Counsel

May, 1964

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nos. 5972, 5986.

COLGATE-PALMOLIVE COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

TED BATES & COMPANY, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Decided November 20, 1962

Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

ALDRICH, Circuit Judge.

These petitions to review and set aside a cease and desist order of the Federal Trade Commission are noteworthy principally because of the extremes to which the dispute has led the parties. We shall refer to the petitioners as they were below, viz., as respondents. Respondent Colgate-Palmolive Company, with the aid and at the suggestion of its advertising agency, respondent Ted Bates & Company, in 1959 released three substantially similar television commercials (hereinafter referred to in the singular) to advertise the "moisturizing" qualities of Colgate's pressurized[1] shaving preparation Palmolive Rapid Shave, hereinafter the cream. The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturiz-

[1] See Carter Products, Inc. v. Colgate-Palmolive Co., 4 Cir., 1959, 269 F.2d 299.

ing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass. The Commission brought a civil complaint against respondents, charging misrepresentations in that " • • • said visual demonstration was a 'mock-up' • • • [and] does not prove the 'moisturizing' properties of Palmolive Rapid Shave, in actual use, for shaving purposes." Respondents' answers admitted that the demonstration was a mock-up, but asserted that the "commercials contained a fair and true illustration of the otherwise proven fact that Palmolive Rapid Shave has excellent wetting qualities." Following a trial the Commission issued a broad order against both respondents of which they now seek review.

Respondents' first defense is that the cream did in fact permit the shaving of sandpaper as apparently shown, so that there was no misrepresentation. This claim is conspicuously lacking in merit. Ordinary coarse sandpaper can be shaved, but not until the cream has remained upon it for upwards of an hour. Even if we could assume that a particularly fine grade of paper, described as "finishing paper," could fall within the common understanding of what the audio portion described as "tough"[2] sandpaper, which we may doubt, and even if the visual demonstration, which was clearly of a coarse[3] brand of sandpaper, did not

[2] Respondents object to the Commission's reference to the adjective "tough" because it was not specifically mentioned in the complaint, and elsewhere make other, similar, objections. There was no dispute as to what was in the commercial. We can not think the complaint had to set forth every word.

[3] Counsel for respondents claim that the purported sandpaper looked coarser on the movie exhibit introduced in evidence by the Commission than it appeared to the television viewers. Apart from the absence of evidentiary support for this contention, it is pointless in the light of the candid testimony of one of Bates' employees that the commercial's sandpaper appeared coarser than the finishing paper on which respondents rely.

conclusively foreclose that assertion in this case, which we doubt even more, respondents are not aided. Their best evidence was that even finishing paper required that the cream rest upon it for one to three minutes before shaving was possible. The video portion of the demonstration shows no such inconvenient wait, but graphically exhibits no pause or break between the application of the cream to the paper, the reaching for the razor, and the shaving operation. It is true that the accompanying audio portion of the commercial uses the word "soak." Respondents contend that soaking means an appreciable passage of time. The Commission was well warranted in finding that the word "soak" was so unobtrusive that many viewers might not notice it, and that even those who did might conclude that the length of the announced soaking was not one to three minutes or more, but the insignificant interval defined by the visual portrayal, the same as was shown for "soaking" the human beard.[4] It should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom. F. T. C. v. Standard Education Society, 1937, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141; Aronberg v. F. T. C., 7 Cir., 1942, 132 F.2d 165.

Respondents next contend that the length of time required to shave sandpaper was not within the pleadings. We agree with them that the Commission did not happily phrase its order denying a motion to amend the complaint. Although respondents predicate some argument on this denial, which the Commission might well have anticipated, one may nevertheless question how seriously they were misled into thinking the issue was simply whether sandpaper of a variety not depicted could eventually be shaved.

---

[4] Respondents do not make the contrary suggestion that beards, too, must be soaked for one to three minutes. Indeed, they could not, without making the picture a serious misrepresentation in another respect.

when the complaint plainly charged that the "commercials, which include a visual demonstration * * * represented, directly or by implication, that * * * it is possible to forthwith shave off the rough surface of said sandpaper * * *." More important, respondents have not been able to suggest to us how, in the light of the evidence which they introduced after a suitable interval to prepare against the Commission's showing, they have been prejudiced. Rather, we think they are simply trying to restrict the issue to one they might be able to meet, instead of one they plainly cannot. The Commission rejected this attempt, and we agree.

Next, respondents assert that the commercial, even if not true with respect to sandpaper, was mere metaphorical puffing; that there is no contention that the cream did not possess entirely adequate moisturizing properties for shaving humans (the Commission makes no claim of inadequacy of the cream); that no one bought the cream intending to shave sandpaper, and that therefore there was no misrepresentation as to any material matter. Within limits we are sympathetic with the principle allegedly underlying respondents' contention. Graphic visual demonstrations that have dramatic appeal may well be mere puffing. References to sandpaper beards may of themselves be harmless, and so may be pictures illustrating the analogy. We see no objection to obvious fancy, provided there is no underlying misrepresentation. But respondents' difficulty is that they do not come under any such principle. They went far beyond generalities and eye-catching devices into asserting as a fact that the cream enables sandpaper to be shaved forthwith, and that this fact "proved" the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation.[5] We agree with the

[5] The Commission makes an interesting counter-suggestion. If shaving sandpaper did *not* prove something about shaving humans, was there not a still further misrepresentation?

Commission that it is immaterial that the cream may in fact have adequate shaving qualities. If a misrepresentation is calculated to affect a buyer's judgment it does not make it a fair business practice to say the judgment was capricious. Mohawk Refining Corp. v. F. T. C., 3 Cir., 1959, 263 F.2d 818, cert. den. 361 U.S. 814, 80 S.Ct. 53, 4 L.Ed.2d 61; C. Howard Hunt Pen Co. v. F. T. C., 3 Cir., 1952, 197 F.2d 273.

It may well be that little injury was done to the public by respondents' representations. We suggested in our opening sentence that we consider this a rather trivial case. Nonetheless, we could not possibly say that it was not within the province of the Commission to conclude that such conduct should be forbidden. Colgate's motion to dismiss the complaint was properly denied.

Respondent Bates contends that as a mere advertising agency no order should be entered against it in any event. On one occasion the Commission has drawn such a distinction on the ground that the agency was but a secondary actor. This ruling, however, was expressly stated to be a matter of "sound discretion." Bristol-Myers Co. et al., 1949, 46 F.T.C. 162, 176. Where, as here, the Commission was warranted in finding that the advertising agency was an active, if not the prime, mover, we could not say that the Commission lacked either jurisdiction or discretion. Cf. C. Howard Hunt Pen Co. v. F. T. C., supra 197 F.2d at 281; Chas. A. Brewer & Sons v. F. T. C., 6 Cir., 1946, 158 F.2d 74; see also National Cash-Register Co. v. Leland, 1 Cir., 1899, 94 F. 502, 507, cert. den. 175 U.S. 724, 20 S.Ct. 1021, 44 L.Ed. 337.

Very different questions, however, arise when we come to the scope of the order. The interdiction of which respondents principally complain prohibits the following:

> "Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or

merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations, depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product."

Analysis of this portion of the order shows it to be quite ambiguous. On first reading we had thought that, in effect, it simply forbade demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess. There could be no objections to such an order except respondents' special objection that this particular one embraces too many products. But respondents say that the language goes far beyond such conduct, and would prohibit any demonstration even if it did not misstate facts about, or misrepresent the appearance of, the product, if it was not "genuine" in that the actual substance used in the studio, because of technical problems of photography, was not the product itself. In other words, it would be no defense that, as the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective. Similarly, it appears that coffee, orange juice and iced tea lose their true colors, so that artificial substances have to be substituted to make them look natural, while in another area products such as ice cream and the "head" on beer melt under the hot camera lights and require the use of more stable substitutes. On consideration we agree with respondents that the order may be read as forbidding such conduct. Furthermore, we believe that

this was the Commission's intention.[6] In its opinion accompanying the order the Commission stated that one of the issues was whether, even if the cream permitted the shaving of sandpaper precisely as pictured, there was "nonetheless a misrepresentation * * * and an unfair advertising practice." The Commission resolved this issue by concluding that it was "an illegal practice," and was likely to deceive the public and cause purchasers to buy what otherwise they would not have bought.[7]

We, of course, agree with the Commission that there is a misrepresentation, of a sort, in any substitution case. But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means. We suggested to counsel that this could be readily tested. Suppose, in the case of color television, a milk producer wishes to advertise the rich quality of his cream. Obviously

---

[6] Indeed, the Commission seemed eager to raise this question. For example: "Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different."

[7] To be doubly sure our understanding of the Commission's position was correct, we put the following case to its counsel. Suppose a prominent person is photographed saying, "I love Lipsom's iced tea," while, apparently, he drinks a glass of iced tea. In truth the individual does like Lipsom's tea, and frequently drinks it, but for the above-mentioned technical reasons is then drinking colored water. What the viewer sees on the screen looks exactly as Lipsom's iced tea does in fact look. Asked if this would be misconduct, counsel replied that it was the Commission's position that it would be, because the viewer has been led to believe he is seeing iced tea when in fact he is not.

he cannot use a foreign substance so that his product will appear yellower and richer than it is. But, equally, should he be allowed to use his own cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not. Yet if he used an artificial substance in order to produce the exactly correct appearance, under the Commission's rule there would be deceit. Counsel gave no answer. We are not critical of counsel, because we think his client has left him without one.[8]

The Commission has confused two entirely different situations. Of course, as we have already said, if a purported demonstration attributes to a product qualities it does not in fact possess, the advertiser will not be permitted to say that the product can still do all it needs to do, or is "just as good" even though it does not have the claimed characteristic. The Commission properly said that the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference.[9] But where the only untruth is that the

---

[8] We realize that counsel might have replied that products which do not photograph accurately should never be represented. This would seem—at least to those who use television commercials—a drastic remedy. We believe the burden should be on the Commission to demonstrate an equivalent need.

[9] The Commission also relied on what it called "phony" testimonial cases. F. T. C. v. Standard Education Society, supra, 302 U.S. at 118, 58 S. Ct. at 116; Niresk Industries, Inc. v. F. T. C., 7 Cir., 1960, 278 F.2d 337, cert. den. 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed. 2d 104. We would agree that it is an unfair advertising practice to publish a purported testimonial when none had been received, even if, from the fact that the advertiser's sales were high and constant, it must be obvious that he has many satisfied customers. A more accurate analogy would be if the advertiser did in fact receive a testimonial, but written in ink that would not photograph. Would the advertiser be guilty of deceit if he

substance he sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit.

The present order must be set aside. We do not, of course, suggest that it was erroneous in every particular, but the Commission's fundamental error so permeates the order that we think it best that an entirely new one be prepared. We also think it best that the Commission be the one to do so. We will make, however, two suggestions. The Commission has directed this part of its order to every kind of product that Colgate may hereafter advertise, and, in the case of Bates, with regard to every customer. If mock-ups, or what the Commission chooses to call demonstrations that are not "genuine," were illegal per se, then it might be appropriate, although we need not decide, to enter a broad order forbidding all such demonstrations en masse. We have undercut the basis for any such order. Under our construction there is no showing of any "method" or "practice" in the sense discussed by the Commission in its opinion. Respondents' only offense was the making of a single misrepresentation about a single product. The fact that this was accomplished by a "demonstration" did not warrant a broad order against all future misrepresentations of any kind by demonstrations any more than the fact that a misrepresentation was made in print would justify an order against all future

---

copied it over and photographed the copy? If an endorser may not be shown enjoying colored water that looks like, but is not, iced tea, then, seemingly, it would not be "genuine" to photograph a copy of a testimonial leading viewers to believe it was an original document. It is difficult to think the Commission fully appreciated the principle it has espoused.

misrepresentations of any kind by printing. The Commission has revealed that it is well aware of the scope to be applied to single misrepresentations, and we need say no more on this subject. See e. g., Colgate-Palmolive Co., Docket No. 7660, March 9, 1961, Trade Reg. Rep., (1960-61 Transfer Binder) ¶ 29445.

Secondly, with respect to the respondent Bates, we think there may well be a distinction between a principal and an agent in the permissible scope of an order. In some degree a principal may well be held to advertise at his peril. But we have reservations as to how far it is appropriate to go in the case of an agent, in the absence, at least, of any suspicion on its part that the advertisement is false. Cf. Bristol-Myers Co., supra.

Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5972

COLGATE-PALMOLIVE COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

No. 5986

TED BATES & COMPANY, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

DECREE

November 20, 1962

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal Trade Commission is set aside. Further proceedings are to be in accordance with the opinion filed this day.

By the Court:

ROGER A. STINCHFIELD, *Clerk.*

By: /s/ DANA H. GALLUP,
Chief Deputy Clerk.

A true copy:

Attest: ROGER A. STINCHFIELD, *Clerk.*

By: DANA H. GALLUP,
Chief Deputy Clerk.